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PAGE

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 84

OBED M. LASSEN, COMMISSIONER, STATE LAND DEPARTMENT, PETITIONER

v.

ARIZONA EX REL. ARIZONA HIGHWAY DEPARTMENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINION BELOW

The opinion of the Supreme Court of Arizona (R. 33) is reported at 99 Ariz. 161, 407 P. 2d 747.

JURISDICTION

The order of the Supreme Court of Arizona (R. 33, 43) was entered on November 12, 1965, and a petition for rehearing was denied on December 14, 1965 (R. 56). The petition for a writ of certiorari was filed on March 11, 1966, and granted on May 2, 1966 (R. 57, 384 U.S. 926). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

STATUTE AND RULE INVOLVED

Pertinent portions of Sections 24, 25, and 28 of the Act of June 20, 1910 (the Enabling Act of New Mexico and Arizona), 36 State. 557, 572–575, and Rule 12 of the Rules and Regulations Governing Rights of Way, promulgated on December 14, 1964, by the State Land Department of the State of Arizone, are printed in the Appendix, *infra*, pp. 23–27.

QUESTIONS PRESENTED

In the view of the United States, the questions presented are as follows:

Whether a State which, having received land from the United States in trust with directions to devote the land and its proceeds to school purposes, nevertheless takes an easement in the land for purposes of building a highway, may avoid any obligation to restore to the trust fund the amount by which the value of the trust property has been reduced in consequence of the taking by applying a conclusive presumption that the value of the trust lands is always enhanced by highway construction.

Whether, if not, it follows that in every case where an easement for highway construction on school lands is taken the State must pay into the fund an amount equal to the appraised value of the easement plus the net damage to the affected parcel resulting from the taking.

INTEREST OF THE UNITED STATES

In the enabling acts of a number of the western States, Congress granted large tracts of federal land to the new States in trust for specific public pur-

poses, chiefly educational. The present case involves a recurrent issue in the interpretation of these federal trusts: whether, when the State authorities decide to devote a portion of the trust lands to a use not expressly permitted in the trust—specifically, highway construction—they must pay into the trust fund the monetary equivalent of the loss sustained by the trust corpus. Since the Arizona Enabling Act vests in the Attorney General of the United States, concurrently with the responsible State officials, authority to enforce the federal trust (see Statement, *infra*, p. 4), and since the issue in this case is an important one in the administration of the trust,[1] we deem it appropriate to set forth the views of the United States.

STATEMENT

In the Act of June 20, 1910, 36 Stat. 557—an Act to enable the people of New Mexico and Arizona to establish State governments and be admitted to the Union on an equal footing with the original States—Congress made extensive grants to the new States of federal lands located within their borders to be used for specific purposes. More than 8 million acres were granted to Arizona for the support of its schools, and substantial additional land for the support of a university and other public institutions.[2] See Sections 24 and 25 of the Act, 36 Stat. 572–573; *Public Land Statistics 1964* (U.S. Dept. of Interior, Bur. of Land

[1] Its importance is suggested by the fact that nine western States have appeared in this Court as *amici curiae* urging reversal.

[2] For simplicity, we shall refer to all of the lands granted in trust for specific purposes as "school lands."

Management), p. 8. Under the Act, the State holds these lands only "in trust," and the terms of the trust are detailed and explicit. See Section 28, 36 Stat. 574–575.

Thus, it is provided that the lands may "be disposed of in whole or in part only in manner as herein provided and for the several objects specified [*e.g.*, school support] * * * and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same." "Disposition of any of said lands," or of the proceeds thereof, for any other object is declared to be a breach of trust. The trust lands, moreover, are not to be sold or leased except to the highest bidder at a public auction conducted in accordance with rules specified in the Act, and a permanent segregated fund is to be established by the State treasurer to keep all proceeds and rents derived from the lands. This fund is to be invested in safe interest-bearing securities. Only the interest is available for support of the schools. The principal cannot be invaded.

The Act further provides that "[e]very sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this Act shall be null and void." The Attorney General of the United States is given "the duty * * * to prosecute, in the name of the United States and in its courts, such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce" the limitations provided in the Act upon the

use and disposition of the lands and their proceeds. However, it is also provided that "[n]othing herein contained shall be taken as a limitation of the power of the State or of any citizen thereof to enforce the provisions of this Act."

The State Land Commissioner of Arizona, petitioner in this Court, is the State official responsible for the control and disposition of the public lands of the State, including the school lands granted by the federal government in the Enabling Act. See Ariz. Rev. Stat., §§ 37–102, 37–104, 37–131; *State ex rel. Conway* v. *Versluis*, 58 Ariz. 368, 120 P. 2d 410; n. 8, *infra*, p. 11. On December 14, 1964, his department adopted a rule (Rule 12 of the State Land Department's Rules and Regulations Governing Rights-of-Way) to the effect that State and county highway rights-of-way and material sites[3] will be granted only "after full payment of the appraised value of the right-of-way or material site has been made to the State Land Department." (R. 11–12, 18–19.)[4] The new Rule also provided (R. 19) that "appraised value" was to be determined in accordance with the principles of Section 12–1122 of the Revised Statutes of Arizona. This is a general provision governing compensation in eminent domain proceedings. It has been interpreted to entitle the owner of condemned property to the highest open

[3] A "material site" is one from which soil, rocks, etc., are extracted for use in highway construction.

[4] Theretofore, the practice (which previous Land Commissioners had unsuccessfully challenged) had been for the Land Department to allow public (including school) lands to be used by the State for highway purposes without requiring any form of compensation (R. 20).

market value of his property. See *Viliborghi* v. *Prescott School District No. 1*, 55 Ariz. 230, 100 P. 2d 178; *Town of Williams* v. *Perrin*, 70 Ariz. 157, 217 P. 2d 918.[4]

On the same day that the new Rule was adopted, the State of Arizona, on the relation of the Arizona Highway Department, filed a petition for a writ of prohibition in the Supreme Court of the State (R. 1). The court directed the State Land Commissioner to show cause why he should not be permanently restrained from any further action to promulgate or enforce the Rule (R. 25–26). Both sides filed memoranda of points and authorities (R. 3, 18, 26), but no affidavits or evidentiary materials other than a copy of the Land Department's right-of-way rules were submitted (R. 5). The Highway Department made clear that it was challenging only the basic principle embodied in the Rule—that the "State Land Commissioner has jurisdiction to exact compensation from the petitioner for rights of way and material sites granted to it from the 'Trust' lands granted to the state by virtue of the Enabling Act" (R. 26). No question as to the propriety of the appraisal method prescribed by the Rule was raised. The Highway Department contended that "the court's approval or disapproval of any particular method of exacting the compensation or in determining its amount would be outside the issues as presented in this cause." (R. 26–27.)

[4] Section 12–1122 also provides that where only a portion of a parcel is condemned, the owner shall be entitled to any damages caused the remaining portions less any benefit conferred on them. See, generally, *State ex rel. La Prade* v. *Carrow*, 67 Ariz. 429, 114 P. 2d 891.

On November 12, 1965, the Arizona Supreme Court issued its opinion (R. 33). Reaffirming its earlier decision in *State* v. *State Land Department*, 62 Ariz. 248, 156 P. 2d 901, it held "that it is the duty of the Land Commissioner to grant, without compensation, material sites on, and easements for rights of way over state lands held in trust by virtue of the Enabling Act of Arizona," and ordered "that the writ of prohibition be made permanent" (R. 43). The court reasoned that a State highway system enhances the value of land in the State generally; that the value of the trust lands, comprising as they do substantial tracts located throughout the State, would therefore be enhanced rather than depreciated by highway construction upon them; and, hence, that the trust would not be impaired though no compensation was paid (R. 40–41).

ARGUMENT

Introduction and Summary

From the earliest days of our nationhood, in contemplation of the admission of a new State to the union the federal government has made extensive grants of land from the federal domain in the State in trust for the support of the State's schools.* The practice had its antecedents in the colonial era. Its philosophy was stated in the Northwest Ordinance of 1787, in which the Continental Congress set aside por-

*The history of this practice is traced in Orfield, *Federal Land Grants to the States* (1915), pp. 36–52; Hibbard, *A History of the Public Land Policies* (1924), pp. 305–318; Donaldson, *The Public Domain* (1884), pp. 223–226.

tions of the Northwest Territory for school purposes—a precursor of the later grants. "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." 12 *Journals of Congress* 61. Over the years, almost 80 million acres have been granted by the federal government to the States for the support of their common schools. *Public Land Statistics 1964* (U.S. Dept. of Interior, Bur. of Land Management), p. 9.

The early grants were general in terms. They provided that the State was to hold the land in trust for the purposes specified in the grant, but they did not delineate with particularity the duties of the trustee, especially with regard to the sale of land covered by the grant and the disposition of the proceeds. Under these grants, improvident dealings in school lands were widespread. To avert dissipation of trust assets for the future, Congress progressively tightened the terms of the trust in later grants, notably the Enabling Act of New Mexico and Arizona.[7] That Act contains elaborate safeguards with respect to the sale and lease of the trust lands and the disposition of the proceeds and rents designed to prevent impairment of the trust (see Statement, *supra*, p. 4), and any attempt to use such proceeds other than as prescribed in the Act may be enjoined. *Ervien* v. *United States*, 251 U.S. 41.

[7] See *Murphy* v. *State*, 65 Ariz. 338, 181 P. 2d 336; S. Rep. No. 454, 61st Cong., 2d Sess., pp. 19–20; Orfield, *supra*, n. 6, pp. 48–52; Hibbard, *supra* n. 6, pp. 317–318.

Concerned as they were with problems arising from the disposal of school lands by sale or lease, the framers of the Act neglected to focus on the distinct question of the consequences of a State itself using the lands for objects other than those specified in the Act—for example, building highways. Such a use would appear to be at least a technical breach of trust. But since the State is free to sell trust lands (so long as it complies with the conditions in the Act relating to the method of sale and use of the proceeds), most courts that have considered the question have concluded that the State may, instead, use them itself for a non-school purpose. The more difficult question—on which the Act is silent—is what provision the State must make for compensating the trust for such a taking. The Supreme Court of Arizona has held the State need make none, at least when the taking is for highway construction. The highest court of New Mexico disagrees (*State* v. *Walker*, 61 N.M. 374, 301 P. 2d 317), as do the *amici*.

In view of Congress' overriding purpose to preserve unimpaired the value of the trust established by the Enabling Act, we reject the proposition that a State is free to divert school lands to other public purposes without reimbursing the trust fund to the full extent of any impairment. The Supreme Court of Arizona reasoned that highway construction always enhances the value of the trust lands more than it reduces the value of the directly affected parcel and hence that compensation is never due. But, surely, the court's premise is not universally valid. Conceivably, some highway construction may depress the value of the

affected tract without producing an equal or greater enhancement of the value of the remaining school lands. The State cannot, in our view, presume enhancement. The matter must be put to proof. Otherwise, the risk of impairment of the trust corpus is great.

It does not follow, however, that the State Supreme Court was required to approve the rule adopted by the State Land Commissioner, which requires the State in every case where it takes a highway right-of-way or material site to pay compensation in accordance with eminent-domain principles of valuation and compensation codified in Section 12-1122 of the Arizona Revised Statutes. In many cases, highway construction on school lands probably does enhance the total value of the trust lands more than it diminishes the value of the directly affected parcel. An offset of this kind apparently would not be recognized under normal condemnation principles. Here, however, different considerations come into play. We do not believe the State should be compelled to pay compensation beyond what is realistically necessary to protect the integrity of the trust.

The parties have not addressed themselves to these problems of compensation. The Highway Department, indeed, indicated early in this proceeding that such problems were not within the scope of its challenge to the State Land Commissioner's rule. The court below, moreover, apparently viewed the case as presenting only the issue whether the State Land Commissioner may ever demand compensation for a highway taking of school lands. We urge this Court, therefore, to reverse the judgment below and

remand the case to the Supreme Court of Arizona with instructions to vacate the writ of prohibition insofar as it precludes the State Land Commissioner, in all cases, from requiring compensation as a condition to granting a highway right-of-way or material site, making clear that the court below is not bound to apply the particular method of determining compensation prescribed in the Commissioner's rule.[8]

I. THE PURPOSES OF THE ENABLING ACT FORBID THE TAKING OF SCHOOL LANDS FOR HIGHWAY CONSTRUCTION WITHOUT COMPENSATION TO THE TRUST FUND FOR ANY IMPAIRMENT OF THE VALUE OF THE TRUST CAUSED BY THE TAKING

A. The issue in this case may be brought into sharp focus by a comparison with that in *Ervien* v. *United States,* 251 U.S. 41—the only other case concerning the trust provisions of the Enabling Act of New Mexico and Arizona to have come before this Court. In *Ervien,* the State of New Mexico authorized its Com-

[8] A word on the justiciability of this case may be in order, in view of the fact that both parties are agencies of the State of Arizona. The State Land Commissioner appears to be a substantially independent officer. He is appointed for a period of years (six) and he can be removed only for cause. He evidently has ultimate responsibility for control of the public lands of the State. Ariz. Rev. Stat., § 37–131; see, also, §§ 37–102, 37–104. In effect, he is the trustee of the trust created by the Enabling Act, and a trustee should always be able to obtain instructions as to his duties under the trust from a court. In addition, since the Commissioner has custody of all public lands, the Highway Department cannot obtain highway rights-of-way on school lands without a grant from the Land Commissioner—which the latter refuses to make except under the conditions prescribed in his rule. Therefore, the basic elements of a justiciable case seem present.

missioner of Public Lands to expend three cents of every dollar collected by him from sales and leases of State lands (including school lands granted to the State in trust by the Enabling Act) to publicize the resources and advantages of the State, especially to home-seekers and investors. This Court, in a brief opinion, held that the expenditure was forbidden by the Act. The breach of trust was indeed patent. The Act expressly provides that the proceeds of any sales, and the income from any leases, are to be kept in a permanent, segregated fund, and the fund invested in safe interest-bearing securities. Only the interest may be spent at all—and then, of course, only for the support of the specific objects of the trust. To allow a portion of the fund to be spent for advertising would, thus, be directly contrary to Congress' fundamental purpose—preserving the trust fund intact. See, also, *State ex rel. Ebke* v. *Board of Educ. Lands and Funds,* 159 Neb. 79, 65 N.W. 2d 392; *State* v. *Fitzgerald,* 5 Idaho 499, 51 Pac. 112; *Murphy* v. *State,* 65 Ariz. 338, 181 P. 2d 336.

The present case is different in that while the Act makes detailed provision for the disposal of school lands to private persons and for the handling of the proceeds, it does not advert to the propriety or the consequences of the State's using the lands for purposes other than those specified in the grant. We must thus consider, first, whether such a use is consonant with the statute and, second, if so, whether the trust must be compensated for the taking.

1. The argument that a State may not use its school lands for any purpose other than support of its schools

has some support in the language of the Enabling Act, but it has generally—and we think rightly—been rejected. *Ross* v. *Trustees of Univ. of Wyoming,* 30 Wyo. 433, 222 Pac. 3, 31 Wyo. 464, 228 Pac. 642 (on rehearing); *State* v. *Walker,* 61 N. M. 374, 301 P. 2d 317; *Grosseta* v. *Choate,* 51 Ariz. 248, 75 P. 2d 1031. *Contra*: *State ex rel. Galen* v. *District Court,* 42 Mont. 105, 112 Pac. 706. If, as the Act expressly provides, the State is free to sell school lands to private persons, subject only to the conditions that the sale be conducted in the manner prescribed in the Act and that the proceeds be placed in the school fund, it seems wholly artificial to preclude the State from using, instead of selling, the land for non-school purposes. The permission to sell clearly indicates that Congress had no intention of requiring the States to use the particular lands granted to it as actual building sites for schools. It would be preposterous to suppose that Congress believed common schools would occupy 8 million acres of the State of Arizona. The congressional purpose was to provide the States with a fund—initially in the form of land, but with the expectation that much of it would eventually be converted to cash—for the support of education.[9] So long as the

[9] This is also indicated by the fact that whereas in the early grants only one section per township was set aside for school support, four sections per township were granted for this purpose to New Mexico and Arizona because most of the unappropriated lands in those States were arid and of little value. Orfield, *supra* n. 6, p. 45. Also, in keying the grant to sections and townships, Congress was rigidly following the checkerboard pattern of the master survey of the federal domain—a pattern that is strictly geometrical and without conscious regard for the particular topography, let alone the school needs,

fund is not depleted, it should not matter whether the land is conveyed to a private purchaser or to a State agency.

The argument in favor of permitting the State to use, rather than sell, school lands for non-school purposes is especially forceful when the contemplated use is public highway construction. Suppose the State decides to build a highway between two cities and the natural route for the highway would cross a tract of school land. Must the State detour the road around the tract? In many cases, that would be a wasteful and pointless procedure. Must the State first auction the affected land to a private purchaser in the manner provided in the Enabling Act and then condemn the property? That would be impractical as well as redundant. There is not likely to be a market for public highway rights-of-way, the interest being auctioned.

To deter highway building by insisting on the letter of the Act would also be unfortunate in that, in many instances, a public highway built on Arizona school lands is probably a real improvement which enhances their value. We may assume that many of the tracts are in remote and relatively inaccessible areas of the State, and that highway construction across them will increase their marketability, and ultimately, therefore, enrich the trust fund. It would ill accord with the purposes of Congress in estab-

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of each State. (For a description of the survey, see Memorandum for the United States as *Amicus Curiae*, *Placid Oil Co. v. Union Producing Co.*, pending on petition for certiorari, No. 85, O. T., 1966.)

lishing the trust to thwart so potentially beneficial a use of the lands.

In light of these considerations, we submit that the provision in the Enabling Act that precludes disposition of school lands other than as provided in the Act should not be read literally. Cf. 4 Scott, *Trusts* (2d ed., 1956), § 381; 2 *id.*, § 167. This result is consistent with the legislative history. Congress was concerned with the problems arising from the sale or lease of school lands. It desired to ensure the integrity of the trust by closely regulating the commercial exploitation of the lands. It never focused upon the distinct question involved in the use of school lands by a State agency for highway purposes.

2. So far, the parties are on common ground; none suggests that it is improper for the State of Arizona to use its school lands for highway purposes. It appears also to be common ground that to the extent such use may diminish the value of the trust, the trust fund must be compensated for the loss. Certainly, in view of Congress' manifest concern with preserving the trust's integrity, it would be untenable to maintain that a State is free to divert school lands to purposes not specified in the Act, without paying such compensation to the fund as may be necessary to make the trust whole. Moreover, that result could not be reconciled with the provision of the Act that "[e]very * * * conveyance * * * of or concerning any of the lands hereby granted or confirmed, or the use thereof * * * not made in substantial conformity

with the provisions of this Act shall be null and void."[10] If there is to be "substantial conformity," the trust may not be impaired as a result of the use of the lands for a purpose not specified in the Act.

B. The contested issue here is thus a narrow one. It is whether it may be conclusively presumed that the use of Arizona school lands for highway rights-of-way and material sites invariably results in a net enhancement of the value of the school lands as a whole. That is the holding of the Supreme Court of Arizona in this case. We urge this Court to reject it. There may well be instances where highway construction on school lands is on balance beneficial to the lands, but one can readily conceive of instances where this is not so. Suppose a tract of school land is located in an area suitable for residential development, and the State decides to put a superhighway through the middle of it, destroying its considerable potential for such development. The damage to the trust is appreciable; it is unlikely to be completely offset by any increment in value contributed to the school lands in general by the construction of an additional major highway in the State.

In such a case, to fail to contribute to the trust fund an amount equal to the impairment caused by the taking would run squarely counter to the purposes

[10] There is some suggestion in the opinion of the Supreme Court of Arizona that the Act is concerned only with the taking of a fee interest in school lands, not an easement (R. 39). The quoted language from the Act refutes this point. The grant of an easement, whether for a highway right-of-way or material site, is plainly a conveyance of or concerning the affected land or its use.

of Congress. And because such cases may occur, the State may not, in our view, place the issue whether compensation is necessary beyond proof, as it has attempted to do in adopting an artificial—and irrebutable—presumption that such compensation is never necessary. However, as next we urge, it does not follow that the State in school-land takings is liable to the trust fund to the precise extent as in ordinary condemnation proceedings—the standard proposed by the State Land Commissioner in the rule that triggered this litigation.

II. IN EVALUATING, FOR PURPOSES OF ASSESSSING THE COMPENSATION DUE THE TRUST FUND, THE IMPAIRMENT OF THE TRUST CAUSED BY THE TAKING, THE STATE IS NOT NECESSARILY BOUND TO APPLY PRECISELY THE SAME PRINCIPLES THAT WOULD BE APPLIED IN ORDINARY CONDEMNATION PROCEEDINGS

The court below, holding that compensation to the trust fund need never be paid by the State Highway Department, did not reach the question under what standards such compensation should be computed (though it did, in passing, register criticism of the Land Commissioner's proposal to base compensation on a parcel-by-parcel valuation, without consideration of the impact of the highway construction on the value of the trust lands as a whole (R. 40)). Accordingly, there is no occasion for this Court to reach the question. We do, however, suggest that the Court need not endorse the rigid compensation formula prescribed in the Commissioner's rule, which equates the obligation of the State to the trust fund to that the State would bear to a private individual if it con-

demned a highway right-of-way (see Statement, *supra*, pp. 5–6).

So saying, we recognize the force of the argument in support of such a principle of compensation. Treating the State's use of school lands for highway purposes as the appropriation of an easement for which compensation is due in accordance with the usual principles applicable in eminent-domain proceedings has the considerable advantage of easy administration. Too, it could be argued that such a rule is likely to most nearly approximate the results of a public auction—the method prescribed by the Enabling Act for the sale of school lands. It is, perhaps, the rule most likely to provide an ironclad guarantee of the integrity of the trust corpus. But it has a serious drawback.

It appears that, under the law of Arizona, an owner is entitled to the fair market value of the easement or other interest condemned, even if the value of the underlying fee is increased by the taking.[11] As applied to the unique landholding represented by the 8 million acres of school lands in Arizona, this principle could occasionally produce highly unrealistic results.

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[11] Such enhancement may be offset only against any additional damages—beyond the fair value of the condemned interest—that the fee may have sustained as a result of the taking. Ariz. Rev. State., § 12-1122; Statement, *supra*, p. 6, n. 5. Other jurisdictions may permit enhancement to be set off against fair value as well. See, generally, Dodge, *Land Acquisition for State Highways*, 1953 Wis. L. Rev. 458; Crouch, *Valuation Problems Under Eminent Domain*, 1959 Wis. L. Rev. 608. But none to our knowledge would permit evidence of any enhancement beyond that of the immediately affected parcel to be considered.

For, as noted earlier (p. 16, *supra*), there are undoubtedly cases where highway construction is likely to enhance the market value of the school lands of the State as a whole far more than it diminishes the market value of the particular parcel in which the easement is taken. In a case where that is so, the taking would not impair the trust, and a contribution to the trust fund would therefore not be required to fulfill the congressional objective of preserving the value of the trust intact.

We see no objection in principle to the State's taking this factor into account. To forbid it do so, indeed, might deter highway construction which was clearly advantageous to the school lands, by precluding the State Land Commissioner from inviting the State Highway Department to utilize school lands for such a purpose without demanding an eminent-domain award. While, as noted, the consideration we suggest represents a departure from standard eminent-domain principles, the school lands—considering their extent and wide dispersal throughout the State—cannot be likened to conventional private property interests. The law of eminent domain was not developed with this unique situation in mind.

We emphasize, however, that the burden of proof is upon the State Highway Department to establish, with reasonable definiteness, the enhancement of the value of the school lands allegedly created by a particular taking. Enhancement cannot be presumed. The presumption, rather—which it is for the highway authorities to rebut, if they can, on a factual case-by-case basis—is that a diversion of school land to a

non-school use has impaired the trust to the extent of the fair value of the easement plus any incidental damages.

Thus, we urge merely that in devising an appropriate measure of compensation to the trust for highway takings, it may be appropriate—in view of the silence of the statute on the point—to allow the State a flexibility and latitude commensurate with the equitable character of a trustee's powers and duties. See, generally, 2 Scott, *Trusts* (2d ed., 1956), § 164. We do not consider this result foreclosed by *Ervien* v. *United States,* 251 U.S. 41 (pp. 11–12, *supra*). The State in that case argued that the expenditure of a portion of the trust fund for advertising the attractions of the State should be permitted because it would enhance the value of the school lands. This Court rejected the argument, and properly so. Any expenditure of trust monies for non-school purposes was expressly forbidden by the Enabling Act. The legislative intent to preserve the fund intact was unmistakable. There was accordingly no occasion to consider the wisdom of the expenditure in relation to the overall purposes of the trust. Cf. *Ashburner* v. *California,* 103 U.S. 575. Since, in the present situation, the language of the Act provides no sure measure of the State's obligations,[12] the State is perforce required to look to those general purposes for guidance. And since the thrust of the Act is to allow the State considerable flexibility in the use of particular trust lands so long as the value of the trust corpus is not

[12] As noted earlier (p. 14), the provisions relating to the sale of trust lands are inapposite to a highway taking.

impaired, we conclude that the State may properly adopt a principle of compensation that considers the impact of the taking upon the value of the trust as a whole rather than focuses narrowly upon the value of the interest condemned.

CONCLUSION

The judgment below should be reversed and the case remanded.

Respectfully submitted.

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AUGUST 1966.

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APPENDIX

The Act of June 20, 1910, c. 310, 36 Stat. 557, *et seq.*, provides in pertinent part:[1]

* * * * *

SEC. 24. [36 Stat. 572.] That in addition to sections sixteen and thirty-six, heretofore reserved for the Territory of Arizona, sections two and thirty-two in every township in said proposed State not otherwise appropriated at the date of the passage of this Act are hereby granted to the said State for the support of common schools * * *.

SEC. 25. [36 Stat. 573.] * * * [T]he following grants are hereby made, to wit:

For university purposes, two hundred thousand acres; for legislative, executive, and judicial public buildings heretofore erected in said Territory or to be hereafter erected in the proposed State, and for the payment of the bonds heretofore or hereafter issued therefor, one hundred thousand acres; for penitentiaries, one hundred thousand acres; for insane asylums, one hundred thousand acres; for school and asylums for the deaf, dumb, and the blind, one hundred thousand acres; for miners' hospitals for disabled miners, fifty thousand acres; for normal schools, two hundred thousand acres; for state charitable, penal, and reformatory institutions, one hundred thousand acres; for agricultural and mechanical colleges, one hundred and fifty thousand acres; and the national appropriation heretofore annually paid for the

[1] The Act was amended, in respects not material here, by the Act of June 5, 1936, c. 517, 49 Stat. 1477, and the Act of June 2, 1951, c. 120, 65 Stat. 51.

agricultural and mechanical college to said Territory shall, until further notice of Congress, continue to be paid to said State for the use of said institution; for school of mines, one hundred and fifty thousand acres; for military institutes, one hundred thousand acres; and for the payment of the bonds and accrued interest thereon issued by Maricopia, Pima, Yavapai, and Coconino counties, Arizona, which said bonds were validated, approved, and confirmed by the Act of Congress of June sixth, eighteen hundred and ninety-six (Twenty-ninth Statutes, page two hundred and sixty-two), one million acres. * * *

* * * * *

SEC. 28. [36 Stat. 574–575.] That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to the said Territory, are hereby expressly transferred and confirmed to the said State, shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than for which such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this Act, shall be deemed a breach of trust.

No mortgage or other incumbrance of the said lands, or any thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at

a public auction to be held at the county seat of the county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time, and place of the transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the state capitol, and in that newspaper of like circulation which shall then be regularly published nearest to the location of such lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner, and after the notice by publication thus provided for sales and leases of the lands themselves: *Provided,* That nothing herein contained shall prevent said proposed State from leasing any of said lands referred to in this section for a term of five years or less without said advertisement herein required.

All lands, leaseholds, timber, and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained, nor in any case less than the minimum price hereinafter fixed, nor upon credit unless accompanied by ample security, and the legal title shall not be deemed to have passed until the consideration shall have been paid.

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A separate fund shall be established for each of the several objects for which the said grants are hereby made or confirmed, and whenever any moneys shall be in any manner derived from any of said land the same shall be deposited by the state treasurer in the fund corresponding to the grant under which the

particular land producing such moneys was by this Act conveyed or confirmed. No moneys shall ever be taken from one fund for deposit in any other, or for any object other than that for which the land producing the same was granted or confirmed. The state treasurer shall keep all such moneys invested in safe, interest-bearing securities, which securities shall be approved by the governor and secretary of state of said proposed State, and shall at all times be under a good and sufficient bond or bonds conditioned for the faithful performance of his duties in regard thereto, as defined by this Act and the laws of the State not in conflict herewith.

Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this Act shall be null and void, any provision of the constitution or laws of the said State to the contrary notwithstanding.

It shall be the duty of the Attorney-General of the United States to prosecute, in the name of the United States and in its courts, such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom.

Nothing herein contained shall be taken as in limitation of the power of the State or of any citizen thereof to enforce the provisions of this Act.

Rule 12 of the Rules and Regulations of the State Land Department of Arizona Governing Rights of Way, December 14, 1964, provides:

RIGHTS-OF-WAY FOR STATE AND COUNTY HIGHWAY AND MATERIAL SITES. State and

County Highway rights-of-way and material sites may be granted by the Department for an indefinite period for so long as used for the purpose granted after full payment of the appraised value of the right-of-way or material site has been made to the State Land Department. The appraised value of the right-of-way or material site shall be determined in accordance with the principles established in ARS–12–1122.

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